Petition

81-1611

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1981

CECIL L. MARKS, PETITIONER

VS

CLARA M. MARKS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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QUESTION PRESENTED

DOES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRE A STATE TO GRANT A BLOOD TEST WHERE PATERNITY IS AT ISSUE AND MOVANT AGREES TO BEAR THE COSTS

No.

IN THE SUPREME COURT OF THE UNITED STATED
OCTOBER TERM, 1981

CECIL L. MARKS, PETITIONER,

VS.

CLARA M. MARKS, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF NEW MEXICO

Cecil L. Marks, by and through his attorney, William A. L'Esperance, petitions herein for a Writ of Certiorari to review the decision of the Supreme Court of the State of New Mexico affirming the lower court denial of his Motion for Blood Tests.

The cause involves alleged paternity and child support payments, both past and future. The ruling on the instant motion came initially as an evidentiary ruling prior to trial on the merits.

OPINION BELOW

The Opinion of the Supreme Court of the State of New Mexico, filed on October 23, 1981, affirming the District Court's denial of Petitioner's Motion for a Blood Test is represented in full as Appendix A hereto. That Opinion has not been,and will not be, published.

JURISDICTION

The Opinion appealed from, was filed October 23, 1981. A Motion for Rehearing was denied November 23, 1981. The jurisdiction of this Court is invoked under 28 USC Section 2101 (c).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, Cecil L. Marks, and Respondent were married in 1966, thereafter divorced in 1970. Cecil made support payments for a child born during wedlock for a period of five years, but discontinued when paternity became highly questionable and filed a motion to nullify support.

Cecil moved for a blood test to clarify the issue; the District Court (general jurisdiction) denied the motion (see Appendix B).

Following judgment against Petitioner on issues of paternity and support, Cecil appealed to the New Mexico Supreme Court, raising due process grounds. The decision of the lower court was affirmed on October 23, 1981. Motion for Rehearing filed November 2, 1981 (see Appendix C) was rejected by Order filed November 23, 1981.

REASONS FOR GRANTING THE WRIT

The decision below significantly undercuts Petitioner's Fourteenth Amendment right to due process of law, raising an important constitutional question not previously decided by this Court, to wit: whether a state may deprive a person of property while creating a significant familial relationship without affording this person access to the most probative and relevant process available, a human lucocyte antigen blood test.

Petitioner, by proper and timely motion, moved the trial court for a human lucocyte antigen (HLA) blood test to determine if the child whose support was at issue was truly his.

This Court has approved language stating:

> "The value of blood tests as a wholesome aid in the quest for truth in the administration of justice in these (paternity) matters cannot be gainsaid in this day." Cortese v. Cortese, 10 N.J. Super. 152, 156, 76 A.2d 717 (1950), adopted in Little v. Streater, U.S. 68 L.Ed.2d 627, 101 S.Ct. 2202 (1981).

> ". . . . due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." Ibid.

The state interest in this case is insignificant. The functional machinery for HLA testing is in daily use in New Mexico and Petitioner agreed to pay the cost. Compare the Matthews v. Eldridge test in Little v. Streater, supra, 101 S.Ct. 2202 at 2205. Quoting again from Little v. Streater:

> "The private interests implicated here are substantial. Apart from the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanctions for non-compliance, at issue is the creation of the parent-child relationship. . . . "

The decision and opinion of the New Mexico State courts herein are their own best proof that Cecil Marks was left without a claim of non-paternity once deprived of the benefits of an accurate HLA test. Denial of this relevant result is deprivation of access to the courts. See Phillips v. Pennsylvania Higher Ed. Assistance, 657 F.2d 554 (Third Cir., 1981).

Moreover, this decision by the New Mexico Supreme Court places this jurisdiction in direct conflict with California decisions stating that California law does not preclude the use of the results of HLA testing to prove non-paternity. The results of such tests are recognized as clearly probative and therefore relevant in an action where paternity is at issue. See Cramer v. Morrison, 88 Cal.App.3d 873, 153 Cal. Rptr. 865, 868 (1979).

Neither the New Mexico nor the California legislatures saw fit to include provisions in their various acts involving parentage allowing

admission of the results of blood tests to show the possibility of paternity. This does not, however, indicate an intent on the part of these legislatures to preclude admission of the HLA type test evidence which results in far higher probabilities of paternity than red blood cell grouping tests.

Petitioner ought not to be denied the only effective process available when the state, through its judicial process, endeavors to pass on the issue of the identity of the father of a child.

> "Obviously, both the child and the (petitioner) in a paternity action have a compelling interest in the accuracy of such a determination." Little v. Streater, supra.

CONCLUSION

In Cecil Mark's case below, Petitioner was never given his one fair chance to test the evidence against him on the issues of child support and paternity. He is due more process than the foggy-science approach used below. This cause ought to be reheard with admission of HLA test results.

Respectfully submitted,

William A. L'Esperance
Counsel for Petitioner
2403 San Mateo Boulevard, N.E.
Suite Plaza 2
Albuquerque, New Mexico 87110
(505) 884-5361

Appendix

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

SUPREME COURT OF NEW MEXICO
FILED
OCT 23 1981

CECIL L. MARKS,

Petitioner-Appellant,

vs. No. 13,

CLARA M. MARKS,

Respondent-Appellee.

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY

D E C I S I O N

Marks filed a motion in the trial court to modify a 1970 divorce decree to nullify his obligation to pay child support based on the allegation that he was not the father of the child. The trial court denied the motion, and we affirm the trial court.

The basic issue presented is whether the trial court abused its discretion by not ordering a blood test.

Marks admitted that the child was his in the divorce complaint and in the decree and later re-affirmed that belief in 1976. No evidence to support the motion was introduced by Marks except his suspicion that Mrs. Marks had said at one time that Marks was not the father of the child. Mrs. Marks denied making such a statement and testified that she had only had intercourse with Marks during their marriage. There was also evidence that the child looked like Marks. Marks has not paid child support since 1975.

Marks moved that the trial court order that a blood test be given to the child. The motion was denied. Mrs. Marks claims this decision was within the discretion of the trial court and should not be disturbed.

> Judicial discretion is a discretion "* * * guided by law, caution, and prudence; it is an equitable determination of what is just and proper under the

> circumstances." State v. Alaniz, 55 N.M. 312, 232 P.2d 982 (1951). It is "* * * not a mere whim or caprice, but an honest attempt, in the exercise of power and duty, to see that justice is done. * * *" Independent Etc. Co. v. N.M.C.R. Co., 25 N.M. 160, 178 P. 842 (1918). Judicial discretion is abused if the action taken is arbitrary or capricious. [Citation omitted.]

State v. Madrigal, 85 N.M. 496, 501 (Ct. App.), cert. denied 85 N.M. 483 (1973).

Under the circumstances here, we find no abuse of discretion.

This decision is not to be published or cited as precedent.

IT IS SO ORDERED.

MACK EASLEY, Chief Justice

WE CONCUR:

DAN SOSA, JR., Senior Justice

WILLIAM RIORDAN, Justice

IN THE DISTRICT COURT OF LEA COUNTY STATE OF NEW MEXICO

CECIL L. MARKS

Petitioner,

v.

CLARA MAE MARKS

Defendant.

No. 30,571
[Consolidated with Lea County, DR 79-264 and Eddy County DR 79-169]

ORDER

This cause having come on to be heard and the Court being fully informed and advised in the premises finds:

1.

That the Court has jurisdiction over the parties and issues in this cause and that said cause is consolidated with causes numbered DR 79-264 of the Lea County District Court and DR 79-169 of the Eddy County District Court.

2.

That the motion of the Petitioner seeking that blood tests be taken of the parties and of the minor child MICHAEL LAVELLE MARKS should be denied.

3.

That the issues of (a) paternity; (b) delinquent child support; (c) change of child support payments; and (d) award of attorney's fee should be tried as otherwise provided by law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

(1) That Lea County Causes numbered 3057 and DR 79-264, and Eddy County Number DR 79-169 is hereby consolidated into Lea County No. 30571.

(2) That the motion of the Petitioner seeking blood tests to be taken by the parties and the minor child Michael Lavelle Marks is hereby denied.

(3) That the issues of (a) paternity of the minor child Michael Lavelle Marks; (b) delinquent child support owing by the Petitioner; (c) change of child support payments; and (d) awarding of attorney's fee will be set for trial as otherwise provided by law.

_____
DISTRICT JUDGE

Approved:

_____
Attorney for Petitioner

_____
Attorney for Respondent

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

CECIL L. MARKS,

Petitioner-Appellant,

-vs- No. 13,623

CLARA M. MARKS,

Respondent-Appellee,

MOTION FOR REHEARING

COMES NOW Appellate counsel of record, William A. L'Esperance, and moves the Court for rehearing of the merits of the above numbered and titled cause, pursuant to Rule 19, New Mexico Rules of Civil Appellate Procedure, and as grounds states:

Justice Easley presided over the cause above, despite adequate notice and request for recusal. The prevailing standard for District Judges exists for logical economic reasons which do not obtain in the Supreme Court. No inconvenience results from re-assigning Supreme Court case, if done sufficiently prior to hearing. Absent a clear and precise reason for remaining on the panel, a Justice's refusal to recuse himself under these circumstances casts a cloud over an otherwise difficult decision.

2. The opinion issued goes beyond the appellate issue of due process and equal protection in discovery, as practiced currently in New Mexico. Blood tests are routinely granted on these facts and Mr. Marks has been denied due process and equal protection by the arbitrary and capricious acts of Judge Reese.

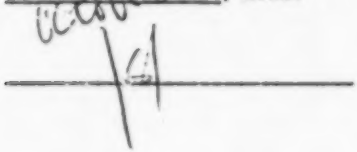
Respectfully submitted,

/s/

William A. L'Esperance
Counsel for Petitioner-Appellant
2403 San Mateo, N.E., P-2
Albuquerque, New Mexico 87110
884-5361

APPENDIX C

I hereby certify that I mailed a true and correct copy of the foregoing Motion to Merrill Norton, opposing counsel of record, at Post Office Drawer 1567, Lovington, New Mexico, on this 24th day of October, 1981.



Opposition

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1611

CECIL L. MARKS, PETITIONER

vs.

CLARA M. MARKS, RESPONDENT

RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF
THE STATE OF NEW MEXICO

MERRILL L. NORTON
Attorney for Respondent
200 So. Love St.
P.O. Box 1567
Lovington, NM 88260
(505) 396-2881

QUESTION PRESENTED

DOES THE DUE PORCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRE A STATE TO GRANT A BLOOD TEST WHERE PATERNITY IS AT ISSUE AND MOVANT AGREES TO BEAR THE COSTS *UNDER THE FACTS AND ISSUES OF MARKS v. MARKS*.

RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF
THE STATE OF NEW MEXICO

Comes now Clara M. Marks, Respondent, by and through her attorney, Merrill L. Norton, and in response to the Petition for Writ of Certiorari moves herein that said writ be denied.

OPINION BELOW

Respondent adopts Petitioner's explanation.

JURISDICTION

Respondent adopts Petitioner's explanation.

CONSTITUTIONAL PROVISION INVOLVED

Respondent acknowledges that the Petition is founded on the "due process" clause of the Fourteenth Amendment; however, the Respondent denies that the question can be resolved per se but must be queried in conjunction with the use of the discretionary powers of the New Mexico District Court which denied the blood test upon the facts as presented by the Petitioner seeking the discretionary powers of the Trial Court.

STATEMENT OF FACTS

The parties were married on April 13, 1966; the contested child Michael was born during wedlock on September 23, 1969; the father filed for divorce on grounds of incompatibility on November 12, 1970, acknowledging under oath Michael was his child; and after the divorce was granted on November 16, 1970, the father paid $50.00 per month child support until July, 1975. Five years later when the mother tried to collect delinquent support payments through the District Attorney's office the father for the first time raised the question of paternity and commenced this action claiming fraud on the Court. After two hearings the Trial Court filed its Findings of Fact (shown by Exhibit A) with supporting judgment for the mother.

IN THE DISTRICT COURT OF LEA COUNTY

STATE OF NEW MEXICO

CLARA M. MARKS,

Plaintiff,

vs.

CECIL L. MARKS,

Defendant.

Nos. 10771, [illegible]
and 10819 [illegible]
(Consolidated)

DECISION OF THE COURT

The Court having heard the testimony and considered the pleadings, including the parties' requested findings of fact and conclusions of law, makes this decision.

FINDINGS OF FACT

1.

The Court has jurisdiction over the parties and [illegible] in these consolidated causes.

2.

Plaintiff and defendant were married in April, 1969, divorced November 14, 1970, and a child was born during the marriage on September 22, 1969.

3.

Michael Lavelle Marks is a minor child born to the parties on September 22, 1969; when the parties divorced, custody of said minor was awarded to the plaintiff, and the Court ordered the defendant to pay to the plaintiff the sum of Fifty Dollars ($50.00) per month as support for said child.

4.

Defendant was given reasonable visitation in the divorce decree and returned to the Court to enforce his visitation in August, 1972.

EXHIBIT A

The last payment of child support made by the defendant was on June 15, 1975, and the defendant owes to the plaintiff delinquent child support payments in the total amount of $3,350.00 through January 15, 1981, inclusive.

6.

There has been a substantial change in the needs of said minor child since the Final Decree was entered in Cause No. 30571 on November 16, 1970; the costs of the food, clothing, shelter and other necessities have increased because of his added years of age and with the inflationary economic influences on such matters; commencing on February 15, 1981, the defendant should pay to the plaintiff for child support the sum of One Hundred Dollars ($100.00) per month until he achieves the age of eighteen (18) years, or until otherwise provided by law.

7.

The minor child, Michael Lavelle Marks, is the natural child of the parties, Clara M. Marks, his mother, and Cecil L. Marks, his father; said minor was born to said parties during wedlock; and there is no reason in law or equity to submit the minor child to a blood test to ascertain his parentage.

8.

The plaintiff has been subjected to an unavoidable need for the extensive services of an attorney reasonably calculated at forty (40) hours at $50.00 per hour and, in the pursuit of her rights in this cause, such need being attributable to the refusal of the defendant to pay child support payments as ordered by the Court; the defendant should pay to the plaintiff attorney's fee in the sum of Two Thousand Dollars ($2,000.00).

CONCLUSIONS OF LAW

1.

The Court has jurisdiction over the parties and issues in these consolidated cases.

Michael Lavelle Marks was born during wedlock to Cecil L. Marks, his father, and to Clara M. Marks, his mother; there is no reason in law or equity to submit the minor child to a blood test to ascertain his parenthood.

3.

A substantial change of facts has occurred since the entry of the Final Decree of divorce which warrant an adjudication of an increase of child support payments to the amount of One Hundred Dollars ($100.00) per month by the defendant to the plaintiff commencing February 15, 1981; that defendant should be ordered to commence such payments.

4.

The defendant owes Three Thousand Three Hundred Fifty Dollars ($3,350.00) delinquent child support payments to the plaintiff and judgment should enter in favor of the plaintiff for said amount.

5.

Judgment should be entered against the defendant for the payment of attorney's fee to the plaintiff in the amount of Two Thousand Dollars ($2,000.00).

All conflicting requested findings of fact and conclusions of law are denied.

J. Randolph Bellar
DISTRICT JUDGE

STATEMENT OF THE CONSOLIDATED CASES

This proceeding combined three District Court actions. The present action was commenced by Clara, the mother, as an indigent Plaintiff through a District Attorney's office to collect back child support. Cecil, the father, answered in that action denying paternity but also filed his own Petition in another county on the same grounds in the old divorce file where all of the subsequent action took place in the combined files. (The third action was a separate attempt Clara had made a few years earlier to collect child support but later dropped for lack of funds.)

It is noteworthy that when Cecil opened up the old action he did not move for a blood test in his original "Motion Order Nunc Pro Tunc". His motion merely denied parenthood because of alleged statements made by his ex-wife. Clara denied the allegations contained in Cecil's motion and counterclaimed for delinquent child support and moved to consolidate all these actions. When Cecil filed his "Answer to Counterclaim" it was here for the first time that he broached the subject of a blood test, but such subject was not claimed to be his constitutional right but was sought through the discretionary powers of the Trial Court.

At no time during the first hearing on Cecils' motion was any constitutional right to a blood test asserted. (See Cecils' original Motion for Order Nunc Pro Tunc and his Answer to Counterclaim, Exhibits A and B attached.) At this hearing the trial court denied the test and declared that the issue

of paternity would be preserved for trial. (See Transcript of Proceedings, Exhibit C.) After the order was entered Cecil changed attorneys and tried unsuccessfully to appeal the interlocutory order. The Supreme Court by "verbal order" quashed the appeal because of it being "improvidently filed".

Cecil changed attorneys again and returned to the Trial Court with a "Motion to Reconsider" (see attached Exhibit D) the refusal of a blood test. For the first time he charged the Order as "contrary to state law and the United States Constitution" but made no claim of a specific constitutional right to such a blood test.

Following trial on February 11, 1981, the trial court entered its Findings of Fact and Conclusions of Law and Judgment on March 19, 1981. A providential appeal was then taken by Cecil and the New Mexico Supreme Court upheld the trial court's findings of fact that Cecil is the father of Michael.

IN THE DISTRICT COURT OF LEA COUNTY

STATE OF NEW MEXICO

'73 DEC 1 AM 11 27

CECIL L. MARKS,

PLAINTIFF,

vs.

CLARA MAE MARKS,

RESPONDENT.

NO. 5051

MOTION FOR ORDER NUNC PRO TUNC

COMES NOW, PLAINTIFF AND IN SUPPORT OF THIS MOTION STATES:

I.

THAT PLAINTIFF FILED A DIVORCE COMPLAINT IN THIS CAUSE ON NOVEMBER 12, 1970, AND THE FINAL DECREE WAS ENTERED BY THIS COURT ON NOVEMBER 16, 1970, AS SHOWN ON FILE HEREIN.

II.

THAT DEFENDANT, CLARA MAE MARKS, THROUGH FALSE REPRESENTATION AND FRAUDULENT MISCONDUCT INTENTIONALLY REPRESENTED TO PLAINTIFF THAT THE SAID MINOR CHILD, MICHAEL LAVELLE MARKS, WAS BORN AS A RESULT OF SAID MARRIAGE, WHEN, IN FACT, DEFENDANT WAS MAKING STATEMENTS AND RELATING TO OTHER PEOPLE AVAILABLE TO THE COURT AS WITNESSES THAT PLAINTIFF WAS A FOOL FOR CLAIMING SAID CHILD AND MAKING CHILD SUPPORT PAYMENTS BECAUSE THE CHILD WAS NOT HIS, ALL OF WHICH SHE FRAUDULENTLY KEPT FROM PLAINTIFF.

III.

THAT DEFENDANT COMMITTED AN EXTRINSIC FRAUD ON THIS COURT IN THIS CAUSE BY PRETENDING THAT SAID MINOR CHILD WAS

EXHIBIT A

A RESULT OF ISSUE BETWEEN THE PARTIES HERETO, WHEN IN FACT IT WAS ALL A SUBTERFUGE TO AVOID THE CONSEQUENCES OF HER ACTIONS, KNOWING FULL WELL THAT PLAINTIFF WAS NOT THE FATHER OF SAID CHILD, AND ALLOWING THE COURT TO ENTER IT'S ORDER IN SAID CAUSE ON NOVEMBER 16, 1970, STATING THAT SAID CHILD WAS A RESULT OF SAID MARRIAGE; THAT AN ORDER NUNC PRO TUNC OR OF SUCH OTHER CHARACTER AS TO REDEEM PLAINTIFF AND THE DIGNITY OF THE COURT SHOULD BE ENTERED STRIKING SAID FINDING FROM THE FINAL DECREE OF THIS COURT.

WHEREFORE, PLAINTIFF PRAYS FOR AN ORDER NULLIFYING THE ORDER PREVIOUSLY FILED BY THIS COURT FINDING THAT THE MINOR CHILD, MICHAEL LAVELLE MARKS, WAS BORN AS A RESULT OF THE MARRIAGE BETWEEN PLAINTIFF AND DEFENDANT, AND FOR SUCH OTHER RELIEF AS TO THE COURT MAY BE DEEMED EQUITABLE AND JUST.

CECIL L. MARKS, PLAINTIFF

CLIFFORD L. PAYNE

ATTORNEY FOR PLAINTIFF
POST OFFICE BOX 849
LOVINGTON, NEW MEXICO 88260
505 396-3024

STATE OF NEW MEXICO)
COUNTY OF LEA)

CECIL L. MARKS, BEING FIRST DULY SWORN ON OATH, DEPOSES AND SAYS: THAT HE IS THE PLAINTIFF IN THE FOREGOING MOTION FOR ORDER NUNC PRO TUNC; THAT HE HAS READ SAME, KNOWS

AND UNDERSTANDS THE CONTENTS THEREOF, AND THAT THE SAME IS TRUE AND CORRECT TO THE BEST OF HIS KNOWLEDGE AND BELIEF.

Cecil L. Marks

CECIL L. MARKS, PLAINTIFF

SUBSCRIBED AND SWORN TO BEFORE ME THIS 1st DAY OF JUNE, 1979.

Jackie Henderson

NOTARY PUBLIC

MY COMMISSION EXPIRES:
DECEMBER 12, 1980

I HEREBY CERTIFY THAT I HAVE MAILED A COPY OF THE FOREGOING TO OPPOSING COUNSEL OF RECORD, ERNEST L. CARROLL, ADA, THIS 1st DAY OF JUNE, 1979.

IN THE DISTRICT COURT OF LEA COUNTY
STATE OF NEW MEXICO

CECIL L. MARKS,

PLAINTIFF,

vs.

CLARA MAE MARKS,

DEFENDANT.

NO. 30,571

ANSWER TO COUNTERCLAIM

COMES NOW PLAINTIFF, CECIL L. MARKS, AND IN ANSWER TO DEFENDANT'S COUNTERCLAIM HEREIN, STATES:

I.

THAT PLAINTIFF ADOPTS HIS ANSWER FILED IN LEA COUNTY, NEW MEXICO CAUSE NUMBER DR79-264 WHICH WAS ORIGINALLY FILED IN EDDY COUNTY, NEW MEXICO CAUSE NUMBER DR79-169, AND MAKES SAID ANSWER FILED AS HEREINBEFORE STATED A PART HEREOF FOR ALL PURPOSES AND CONSIDERATIONS.

II.

THAT PLAINTIFF DENIES THAT HE SHOULD BE HELD IN CONTEMPT OF THIS COURT AND GENERALLY DENIES ALL ALLEGATIONS OF DEFENDANT.

III.

THAT PLAINTIFF REASSERTS HIS MOTION AS FILED IN LEA COUNTY, NEW MEXICO CAUSE NUMBER DR79-264 AND STATES IT IS NECESSARY FOR A BLOOD TEST TO BE RUN BY A QUALIFIED TECHNICIAN IN LUBBOCK, TEXAS FROM BLOOD SAMPLES TAKEN FROM PLAINTIFF, CECIL L. MARKS, DEFENDANT, CLARA MAE MARKS, AND THE MINOR CHILD, MICHAEL L. MARKS; THAT THESE SAMPLES BE TAKEN BY A QUALIFIED TECHNICIAN TO BE TESTED IN A LABORATORY IN LUBBOCK, TEXAS, AND SAID RESULTS FURNISHED TO THIS COURT BEFORE THE

EXHIBIT B

HEARING ON THE MERITS ON THE PENDING ISSUES.

WHEREFORE, PLAINTIFF, HAVING FULLY ANSWERED DEFENDANT'S COUNTERCLAIM, PRAYS THAT THE COURT DENIES THE CLAIMS THEREIN, THAT THE COURT ISSUE ITS ORDER DIRECTING THAT BLOOD SAMPLES BE TAKEN FROM PLAINTIFF, DEFENDANT AND THE MINOR CHILD HEREIN BY A QUALIFIED EXPERT, TESTED IN A LABORATORY IN LUBBOCK, TEXAS WITH SAID RESULTS ASCERTAIN BY SAID LABORATORY FURNISHED TO THIS COURT; AND FOR SUCH OTHER AND FURTHER RELIEF AS THE COURT MAY DEEM EQUITABLE AND JUST.

Cecil L. Marks

CECIL L. MARKS, PLAINTIFF

CLIFFORD L. PAYNE

Clifford L. Payne

ATTORNEY FOR PLAINTIFF
POST OFFICE BOX 849
LOVINGTON, NEW MEXICO 88260
505 396-3024

STATE OF NEW MEXICO)
) SS:
COUNTY OF LEA)

CECIL L. MARKS, BEING FIRST DULY SWORN ON OATH, DEPOSES AND SAYS: THAT HE IS THE PLAINTIFF IN THE FOREGOING ANSWER TO COUNTERCLAIM; THAT HE HAS READ SAME, KNOWS AND UNDERSTANDS THE CONTENTS THEREOF, AND THAT THE SAME IS TRUE AND CORRECT TO THE BEST OF HIS KNOWLEDGE AND BELIEF.

Cecil L. Marks

CECIL L. MARKS, PLAINTIFF

SUBSCRIBED AND SWORN TO BEFORE ME THIS 27TH DAY OF JUNE, 1979.

Jackie Hamilton

NOTARY PUBLIC

MY COMMISSION EXPIRES:
DECEMBER 12, 1980

FIFTH JUDICIAL DISTRICT
LEA COUNTY

IN THE DISTRICT COURT OF LEA COUNTY

STATE OF NEW MEXICO

CECIL MARKS,

Plaintiff,

VS.

CLARA MAE MARKS,

Defendant.

DISTRICT COURT

OF

LEA COUNTY

N. RANDOLPH REESE, District Judge

COMMENTS OF THE COURT

Appearances in District Court:

For Plaintiff:

Mr. Clifford L. Payne, Attorney at Law, P. O. Box 84
Lovington, New Mexico 88260

For Defendant:

Mr. Merrill L. Norton, Attorney at Law, P. O. Box 156
Lovington, New Mexico 88260

IN THE DISTRICT COURT OF LEA COUNTY

STATE OF NEW MEXICO

CECIL MARKS,

Plaintiff,

vs.

CLARA MAE MARKS,

Defendant.

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, that the above styled and numbered cause came on for hearing on August 20, 1979, at Lovington, Lea County, New Mexico, before the Honorable R. Randolph Reese, Judge of the Fifth Judicial District, Division IV, in and for Lea County, New Mexico; and the Plaintiff appeared in person and by and through his attorney, Mr. Clifford L. Payne, Attorney at Law, P. O. Box 849, Lovington, New Mexico; and the Defendant appeared in person and by and through her attorney, Mr. Merrill L. Norton, Attorney at Law, P. O. Box 1567, Lovington, New Mexico; at which time and place the following proceedings were had, to-wit:

MR. PAYNE: That's the evidence we have with regard to the fraud issue alone, your Honor. And I might make a statement to the Court that what we're asking for is not a finding at this time one way or the other, we're just asking for a right to give this Court the information. And that's all we're ask for at this time is to allow these blood tests for evidence at a further hearing, not ask to make any finding from the Court.

THE COURT: That's why the Court heard it, to determine whether or not to order [illegible] and on the basis of the information offered, the Court feels that it's not such clear and convincing evidence that the Court should initiate a non-permissive blood test.

MR. NORTON: Thank you, your Honor. I'll draw order to that effect.

MR. PAYNE: May we be heard [illegible] on the issue of child support, increasing it?

THE COURT: Well, as far as I'm concerned, all the issues are still open and the matter will be set trial in the ordinary course.

MR. PAYNE: All right.

THE COURT: Including child support.

MR. NORTON: Thank you, your Honor. I'll draw

an order to that effect.

---oOo---

Best Copy Available

STATE OF NEW MEXICO COUNTY OF LEA

IN THE DISTRICT COURT

CECIL MARKS,

Plaintiff,

vs. No. 30571

CLARA MAE MARKS,

Defendant.

MOTION TO RECONSIDER

COMES NOW the Plaintiff, Cecil L. Marks, by and through his attorney, Loretta Lilley Atkins, and moves the Court to reconsider its ruling of August 20, 1980 wherein the Court denied Plaintiff's motion for a blood test.

As grounds, Plaintiff would show the Court as follows:

1. The legitimacy of a child born in wedlock is a rebuttable presumption. Melvin v. Kazhe, 83 N.M. 356, 492 P.2d 138, 1971.

2. The taking of blood tests does not violate any constitutional protections. Brechaupt v. Abram, 352 U.S. 432 (1952), and Schmerber v. Ca. 384 U.S. 757 (1966), Rochen v. Calif. 342 U.S. 165 (1952), Anthony v. Anthony, 8 N.J. Super. 411, 74 A. 2d 919 (1950).

3. To deny the blood tests is to relegate a paternity question to opinion testimony, when blood testing has reached the point where it is 99% conclusive as to parentage. See "Scientific Evidence and the Ascertainment of Paternity" by H. D. Krause, Family Law Quarterly, Vol. 5, at page 252, July, 1971.

4. In the following states a blood test is conclusive evidence as to paternity. Cal. Evid. §895 (Deering 1967); Ill. Ann. Stat. Chapt. 1063/4 §4 (Smith Hurd.Supp. 1971); Ky. Rev. Stat. Ann. §406.111 (Supp. 1965); N.H. Rev. Stat. Ann. Ch. §505 (1967); Ore. Rev. Stat. §109.258 (1969); Pa. Stat. Ann. tit. 28, §307.5, (Supp. 1971); Utah Stat. Ann., §78.25-21 (Supp. 1969); Wisc. Stat. Ann. §325.23 (1957).

EXHIBIT D

5. George Hargrove, the investigator for the Lea County District Attorney, who testified August 20, 1980, will testify further that Mrs. Clara Marks, Defendant herein, refused to cooperate with the investigation when she was pursuing back child support, and that the question of paternity warranted further investigation.

6. In New Jersey, to refuse a blood test, will allow the Court to find against the person refusing. Cortese v. Cortese 10 N.J. Super. 152, 76 A.2d 717, (1950). See also 9A Uniform Act on Paternity.

7. The Court by refusing a blood test which would prove paternity, allows the presumption of legitimacy to be conclusive, contrary to state law and the U.S. Constitution. Further, by relying upon testimony, the court is allowing opinion, innuendo and speculation to be the determining factors where a scientific procedure would conclusively put the question to rest and allow the parties to resolve the issue once and for all.

8. The child, if in fact found to be illegitimate, would not suffer publicly as was the case in the past. Indeed, the only legal impairments for the child today would be that he would be unable to inherit from Cecil L. Marks.

9. Because of the blood tests' accuracy a Uniform Act on Paternity has come into existence and in fact has been adopted by many states to avoid the problems associated with testimony on this subject matter. See: Blood Test Exclusion Procedures in Paternity Litigation: The Uniform Acts and Beyond, by Mark Edward Larson, 13 J. Fam. L. 713, 739 (1973-1974).

10. As a matter of course, Bernalillo County Child Support Diforcement Bureau, State of New Mexico, honors blood test results as conclusive. Fathers raising the issue must pay for the procedure.

REASONS FOR DENYING THE WRIT

Imposing on the citizens of New Mexico (and the Nation) a decision by this Court to allow a Writ of Certiorari can have only one of two results: (1) Uphold the discretionary powers of the Trial Court in refusing the blood test, or, (2) Declare that any father at any time when charged with support of his purported child may demand a blood test. Result (1) above can be accomplished by merely refusing the Writ. Alternative (2) would be judicial legislation.

To require a blood test under the Trial Court's discretionary powers the father had to overcome the following:

(1) Presumption of his parenthood by virture of the child's birth certificate under New Mexico law: Section 24-14-28(B), N.M.S.A 1978, "A certified copy of a certificate...is prima facie evidence" of the father's identity.

(2) Child was born forty-one (41) months after the parties were married.

(3) His own sworn statement that he was the father of the child in his original divorce proceeding.

(4) The father's payment of child support for a period of five (5) years.

(5) Strong resemblance of the child for the father.

(6) Mothers testimony that she had no sexual relations with any other man during their marriage and the child could only have been his.

(7) Mothers denial that she had ever said the child was not Cecil Mark's.

The Trial Court as the "trier of Facts" had taken testimony from the father in two separate hearings and resolved the issues heard against him each time.

The father, Petitioner for this Writ, relies heavily on the recent case of Little v. Streater, ___U.S.___ 68L. Ed.2d 627,101 S. Ct. 2202 (1981). Blood tests there were determined to be "due process" under a different set of facts and circumstances, namely:

(1) The parties were unmarried at all pertinent times including the time of gestation and birth, and the report only referred to "admitted intimacy" but made no mention of extended cohabitation.

(2) The mother had never let the father see the child.

(3) The state was directly involved as currently paying support for the child in question in an amount of $6,974.48.

(4) The Trial Court had ordered the test but, because the father could not afford it, such tests were not made.

Little v. Streater, Id., p. 2209, states that the "interests implicated here are substantial." Substantial will be a gross understatement of the effect on our whole society if any father can demand a blood test of his purported offspring whenever he decides he wants to shift the burden of upkeep elsewhere. Laying aside the discretion of the Trial Court in Marks v. Marks will create an impact on society not far removed from the ancient stoning of the adulteress and her child.

Greek tragedies portray the untoward results when their mythical "Gods" manipulate earthbound mortals. A ruling in this case to force a blood test on Michael Marks will encourage millions, literally millions, of fathers to seek a chemist when it comes time to pay child support. It

will be a manipulation the likes of which was never remotely achieved in ancient Greece.

The interests involved are multitudinous and demand a forum for debate which only the legislative branch of government affords. After polemic exposure, society might conclude that a time limit should be imposed after which the reputed father could not deny his parenthood. In the recent case of Mills v. Habluetzel, No. 80-6298, 1982, (unreported at this time) the Texas law was stricken, which law allowed only one year after the birth of an illegitimate child for a mother to file suit to prove its paternal parent. The language of the case reflects a concern with the deeper reaches of the question of paternity. It deals with the influence of time as a primary factor for consideration. But, other factors also bear consideration: environment; propinquity; and mutual love - all create psychological dependencies more important to a sound social order than notice of the original conception. These and other profundities should be openly debated in the legislative house if the power of judicial discretion is to be exchanged for "laboratory justice".

Little v. Streater, Id., 2205, quotes from Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33L.Ed.2d 484 (1972) which wisely observes that due process "calls for such procedural protection as the particular situation demands". The only "procedural protection" now available to maintain such social order as presently exists concerning fathers and their child support payments, is the Trial Court's "discretionary powers". To allow Cecil Marks by constitutional

"due process" to have his blood test after this child is twelve years old would produce a disasterous effect on Domestic Relations Courts and our society as a whole.

CONCLUSION

All facts adduced below were unsupportive of the relief Cecil Marks sought through the discretionary powers of the Trial Court. Due process was fulfilled under the circumstances of this case, there being no absolute constitutional right per se for a [illegible] allowed the taking of a blood test to ascertain the certainty or uncertainty of his offspring.

Respectfully submitted,

MERRILL L. NORTON
Counsel for Respondent
200 S. Love - P.O. Box 1567
Lovington, NM 88260
(505) 396-2881

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CECIL L. MARKS, PETITIONER,

VS.

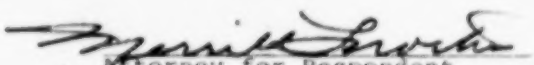
CLARA M. MARKS, RESPONDENT.

No. 81-1611

MOTION TO PROCEED ON APPEAL
IN FORMA PAUPERIS

Comes now the Respondent by her attorney, Merrill L. Norton, and moves to proceed in this cause forma pauperis due to the indigent circumstances of the Respondent whose supporting affidavit is attached hereto.

MERRILL L. NORTON



Attorney for Respondent

By his signature above the foregoing attorney certifies that he has mailed copies hereof to all attorneys of record. May 15, 1982

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CECIL L. MARKS, PETITIONER,

VS.

CLARA M. MARKS, RESPONDENT.

No. 81-1611

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, CLARA M. MARKS, being first duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following: Response to Petition for Writ of Certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

Answer: Yes, but I am on sick leave for a kidney infection drawing only disability insurance until I can return to my job with Amax Chemical Company of Carlsbad, New Mexico. I have been notified that during this coming June I shall be laid off for a temporary shutdown.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Answer: No. I have no income except what I earn as an underground mining equipment operator.

3. Do you own any cash or checking or savings account?

Answer: Yes, my checking account with the First National Bank of Kermit, Texas has a current balance of $25.00. I have no other accounts or savings.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: Yes. I own a 1978 Chevrolet pickup and a 1972 trailerhouse and lot. My debts against these are $9,200.00. I own no other properties and my equity in the above is less than $300.00 under today's circumstances.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer: Myself and my son, Michael Lavelle Marks, age twelve (12).

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Clara M. Marks
CLARA M. MARKS

STATE OF NEW MEXICO)
) SS.
COUNTY OF)

SUBSCRIBED and SWORN TO and ACKNOWLEDGED before me by CLARA M. MARKS this 11th day of May, 1982.

NOTARY PUBLIC

My Commission Expires:

5/26/85

MERRILL L. NORTON
ATTORNEY AT LAW
200 South Love Street
P. O. Drawer 1567
LOVINGTON, NEW MEXICO 88260

Code 505

396-2881

May 14, 1982

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SUPREME COURT, U.S.

Mr. Alexander L. Sevas
Clerk of the U.S. Supreme Court
Supreme Court of the United States
Washington, DC 20543

Cecil L. Marks vs. Clara M. Marks
No. 81-1611

Dear Sir:

Enclosed is a motion for proceeding forma pauperis by the Respondent in this cause. Supporting affidavit of the Respondent is attached to the form.

Also enclosed is the original and one copy of the Respondent's Response to the Petition for a Writ of Certiorari in said cause. This is submitted pursuant to our prior telephone conversation. If it is insufficient please let me know what else may be necessary and I shall attend the need without delay.

Respectfully,

Merrill L. Norton
Attorney for Respondent

cc:William L'Esperance